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FILED SEP 07 2005

SHIRLEY E. FAUST, CLERK

By \_\_\_\_\_ Deputy

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 STATE OF MONTANA,

10 Plaintiff,

11 vs.

12 DUSTIN J. BURCKHARD,

13 Defendant. )

Dept. No. 1

Cause No. DC-04-501

DEFENSE MOTION IN LIMINE  
RE: ELEMENTS INSTRUCTION,  
WITH BRIEF IN SUPPORT

14  
15 MOTION

16 Defendant moves the Court to rule, in advance of trial, that it will give the  
17 elements instruction proposed by the defense, and attached to this motion as  
18 Submission #1, in place of the pattern elements instruction for the offense of rape,  
19 MCJI #5-503(a), which is unconstitutional as well as contrary to statute.

20 BRIEF

21 The offense of sexual intercourse without consent is defined as knowingly  
22 having sexual intercourse with another without consent, Section 45-5-503 MCA.  
23 The pattern elements instruction for this offense promulgated as MCJI #5-503(a)  
24 states the two material elements of the offense accurately, but then states the  
25 mental element ambiguously ("defendant acted knowingly"), failing to explain that  
26 the defendant's knowledge relates to both material elements separately [see text



1 of pattern instruction, Exhibit A]. This defect in the pattern instruction has the  
2 obvious potential to confuse the jury, a confusion which in this case would have  
3 the effect of diluting the State's burden of proof on a critical contested element of  
4 the offense.

5 Sections 45-2-103(1) and 45-2-103(4) MCA, make clear that the mental state  
6 prescribed with respect to any offense as a whole, applies to each element of that  
7 offense. In the case of the offense of sexual intercourse without consent, this  
8 point is critical. It means that in order for defendant to be found guilty, the State  
9 must prove beyond a reasonable doubt both: (1) that the defendant knew he was  
10 having sexual intercourse (usually a trivial proposition, since most defendants  
11 charged with rape obviously were not, and do not claim to have been,  
12 unconscious during the carnal act); and (2) knew that the person he was having  
13 intercourse with did not consent to the intercourse. This second proposition is,  
14 of course, anything but trivial. It involves the possibility that defendant mistakenly  
15 thought his partner desired, or did not object to, intercourse. The ambivalence  
16 and ambiguities surrounding human courtship being what they are, this is often  
17 the crucial element to be resolved in a "date rape" case (such as this one). The  
18 defendant's assertion that he believed his partner, a voluntary social companion,  
19 consented to or acquiesced in the act of sexual intercourse is often referred to as  
20 the "defense" of "apparent consent." It is important to remember, however, that  
21 it is not technically a defense; rather, based on the statutory definition of the  
22 crime, the lack of apparent consent is something the State must establish beyond  
23 a reasonable doubt to obtain a conviction.

24 The jury instruction proposed by the defense is a revision of MCJI #5-  
25 503(a), with element #3 changed to conform to the statutes, and to make clear  
26 to the jury that a defendant cannot be convicted of rape if he believed his partner



1 consented to, or acquiesced in the act of sexual intercourse. It makes clear, in  
2 other words, that the burden is on the State to prove beyond a reasonable doubt  
3 that the defendant knew the act of sexual intercourse was without his partner's  
4 consent.

5 If given, the pattern instruction MCJI #5-503(a) would violate the due  
6 process clause of the U.S. and Montana Constitutions by relieving the State of the  
7 burden of establishing all of the elements of the offense beyond a reasonable  
8 doubt. Sandstrom v. Montana, 442 US 510 (1979).

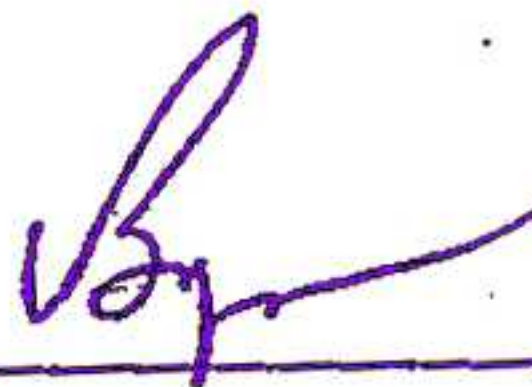
9 RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September, 2005.

10   
11 Boggs and Foley Law Office  
By: William Boggs

12  
13 CERTIFICATE OF SERVICE

14 The undersigned certifies that on September 7, 2005, a true and correct  
15 copy of the foregoing Defense Motion in Limine Re: Elements Instruction, with  
16 Brief in Support was personally served upon:

17 Kirsten LaCroix, Deputy County Attorney  
18 Courthouse  
Missoula, MT 59802

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